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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 250

UNITED STATES OF AMERICA, EX REL.
LLOYD ELDON MILLER, JR.,
Petitioner,

vs.

FRANK J. PATE, WARDEN OF THE ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS,
Respondent.

REPLY BRIEF FOR THE AMICI CURIAE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Three simple facts dominate the entire case. A foreign hair was found in the vagina of the eight-year-old child victim of the rape-murder; the State's crime laboratory discovered and reported that the hair was of human origin but not a hair from the accused;[1] without disclosing this report, the State nevertheless proceeded to try Miller and to procure a death sentence.

The Attorney General of Illinois seeks to escape the conclusion that the case therefore falls squarely within the

1. In its report, the State's crime laboratory appears to qualify its conclusions by stating that it was not "probable" that the hair was Miller's. This use of the word "probable," is simply a special idiom of the laboratory in writing up all of its scientific reports, as the Attorney General of Illinois himself finds it necessary to argue in another connection (see p. 12 of his brief).

rule of *Brady* v. *Maryland*, 373 US 83 (1963), by contending that the mismatch of the hairs was not "material"—that is, that it would have made no difference to the trier of the case to have known about it. The Attorney General does not offer any fresh theory as to how the hair got into the child's vagina but adopts the conjectures of Judge Schnackenberg below that it may have been accidentally deposited by one of the persons who handled the victim immediately after the crime.

This conjecture is wholly foreclosed by two circumstances. During the critical interval, the poor child was handled only by professionals—ambulance attendants and doctors—trained to handle the injured properly (IV R. 34-38). More important, the hair was not found on the surface of the child's body but was taken by vaginal smear (I R. 149) which means from the interior of the victim's vaginal cavity. Although the child's total injuries were dreadful, the abdominal injuries were deeply interior at the point where the vaginal cavity adjoins the muscle wall of the rectum and were not the cause of death (IV R. 36-37). There was no ripping of the abdominal body surface and no exposure of the vaginal area to accidental access, as Judge Schnackenberg seems without reflection to have assumed.

The mind can tolerate no other conclusion than that the hair was left in the child's vagina by the rapist-murderer, as the police manuals cited in our main brief tell us so often happens in cases of this type. We submit therefore that the mismatch of the hairs was material[2] in the elementary

2. With all respect, District Judge Perry's finding of immateriality was clearly erroneous. Moreover, it was not necessary to his decision and must be read in the context of his benign order requiring a new trial for Miller. In any case, it was not a finding of fact on a disputed evidentiary point but a conclusion as to the constitutional significance of undisputed facts. *Napue* v. *Illinois*, 360 Ill. 264, 271 (1959); *cf. Roth* v. *United States*, 354 US 476, 497-98 (1957), *Manual Enterprises* v. *Day*, 370 US 478, 488 (1962).

sense that it would not be possible for any trier in possession of this evidence to reach the conclusion that Miller was guilty. The case is that simple.

Once the local prosecutors sank to the indecency of suppressing evidence so completely inconsistent with guilt instead of facing up to their burden of proving guilt beyond a reasonable doubt in the light of the hair report, every move they made from that point on was necessarily in bad faith.

The Attorney General makes two other points in his brief here, one formal and one feeble. The formal point is that the *Brady* rule requires that there be a specific request by the accused for the suppressed evidence. The defense here did request an opportunity to examine and test the physical evidence in this case (IV R. 2) and that should be sufficient. Furthermore, the *Brady* case cannot be read as requiring that an accused request something he does not know exists. A request cannot be essential in order to bring the principle of prosecutor responsibility into operation, as Judge Thurgood Marshall said in his careful review of the problem in *United States* v. *Wilkins*, 326 F. 2d 135, 137 (CA 2d 1964):

> "We think that such a request is not a *sine qua non* to establish a duty on the prosecutor's part."

See also *Barbee* v. *Warden*, 331 F. 2d 842 (CA 4th 1964).

The State's other point is that the non-disclosure did not prejudice the defense because the accused himself knew about the hair. The Attorney General's reference is to an episode in the accused's account of what occurred during the 52-hour incommunicado detention period, when the State was "coaxing" a confession now shown to be absurd. The accused was apparently told that samples of his hairs matched hairs considered by the police as clues to the crime, whereupon he insisted upon an opportunity

to examine the hairs himself under a microscope in the crime laboratory. The trick did not work, since the accused shouted, "Them hairs don't match" (IV R. 95). As we read the Attorney General's brief on the point, he has placed himself in the extraordinary position of arguing that this effort to trick Miller by a misrepresentation that the hairs *did match* was fulfillment by the State of its obligation to disclose to the defense that it had an official scientific report that the hairs *did not match!*

The Attorney General has correctly argued that this case in the end involves the constitutional obligations of the prosecution. But what is at stake here is not a new rule of pre-trial discovery in criminal cases as the Attorney General seems to think or a demand that all prosecutors live up to the legendary standards of a young Homer Cummings as a public prosecutor. What is at stake in this case is simply that trial prosecutors exhibit the most minimal standards of decency.

Respectfully submitted,

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